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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO ALVAREZ,

Defendant and Appellant.

B206795

(Los Angeles County  
Super. Ct. No. BA322970)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jose Sandoval, Judge. Affirmed in part; reversed in part; and remanded.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Alberto Alvarez beat up his wife, R.A., after he found a love letter she wrote to a male coworker. When R.A. was examined at a hospital later that day, she had severe bruises on her body and extremities. She was released from the hospital with painkillers and needed time off from work to recover. On count 1, appellant was charged with torture, but convicted of assault by means likely to produce great bodily injury (aggravated assault), as a lesser included offense. On count 2, he was charged with assault with a deadly weapon, but convicted of simple assault as a lesser included offense. On count 3, he was charged with and convicted of aggravated assault. On count 4, he was charged with and convicted of corporal injury to a spouse. On count 5, he was charged with, but found not guilty of, false imprisonment. The jury found not true a great bodily injury allegation. He was sentenced to three years in prison on count 3 and a concurrent six-month sentence on count 2. Counts 1 and 4 were stayed. Various sentencing conditions were imposed.

Appellant contends that (1) he was wrongly convicted of aggravated assault on count 1, and (2) some of the sentencing orders were improper. Respondent agrees with most of appellant's contentions and suggests problems with the abstract of judgment.

We dismiss count 1, modify and/or dismiss some of the sentencing orders, order modifications to the abstract of judgment, and otherwise affirm.

## **DISCUSSION**

### ***1. Count 1***

Over defense counsel's objection, the trial court instructed the jury that aggravated assault was a lesser included offense of torture, the crime charged in count 1. The jury found appellant guilty of aggravated assault on that count. Respondent and appellant agree that count 1 must be reversed, for two reasons: Aggravated assault is not a lesser included offense of torture, and the aggravated assault convictions in counts 1 and 3 were based on the same conduct. We therefore reverse count 1.

## ***2. The Disputed Sentencing Orders***

Count 4 alleged corporal injury to a spouse, in violation of Penal Code section 273.5, subdivision (a).<sup>1</sup> Although the trial court stayed count 4, it believed it was required to order payment of \$400 to the “Domestic Violence Fund” and completion of a 52-week domestic violence program. It also imposed a condition that appellant stay away from R.A.

Section 273.5, subdivision (i) authorized the protective order that was issued here, but the trial court erred in failing to determine the length of the order.<sup>2</sup> Respondent concedes that a remand is required for that purpose.

Appellant and respondent agree that the court lacked jurisdiction to order the \$400 payment or completion of a domestic violence class, as those conditions would have been required if probation had been granted, but appellant was denied probation and sentenced to prison. We therefore strike those conditions.

## ***3. Additional Changes to the Abstract of Judgment***

Respondent correctly points out that, to correctly reflect the sentence and comply with law, the abstract of judgment must be changed in these respects:

(1) On counts 1 and 3, appellant was convicted of aggravated assault, and not assault with a deadly weapon, the crime shown on the abstract. Count 1 is reversed, but the abstract must show the correct crime on count 3.

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<sup>1</sup> Subsequent code references are to the Penal Code unless otherwise stated.

<sup>2</sup> Section 273.5, subdivision (i) provides: “Upon conviction under subdivision (a), the sentencing court shall also consider issuing an order restraining the defendant from any contact with the victim, which may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. This protective order may be issued by the court whether the defendant is sentenced to state prison, county jail, or if imposition of sentence is suspended and the defendant is placed on probation.”

(2) The trial court imposed a \$20 court security fee pursuant to section 1465.8, subdivision (a)(1). Appellant was convicted of four counts, one of which we are reversing. Each of the three remaining counts requires a \$20 security fee, for a total of \$60. (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 866.)

(3) Appellant was convicted of simple assault on count 2. The abstract states: “Misdemeanor count 2: serve 180 days in county jail, credit 180 days.” (Capitalization omitted.) Actually, on count 2, the court imposed “six months[,] which can be served in any penal institution concurrent with the previously imposed sentence of three years.” Because appellant was not given credit for time served and the time on it was ordered to run concurrently, the abstract of judgment must be corrected accordingly.

### **DISPOSITION**

Count 1 is reversed. The conditions requiring payment of \$400 to the Domestic Violence Fund and completion of a 52-week domestic violence program are stricken. The matter is remanded for determination of the length of the protective order imposed pursuant to section 273.5, subdivision (i). The abstract of judgment shall be corrected and modified, consistent with this opinion. The clerk of the Los Angeles Superior Court will send a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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FLIER, J.

We concur:

RUBIN, ACTING P. J.

BIGELOW, J.